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No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

BURNS SCOTT HOWARD,

Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether it is per se reversible error for a Federal District Court in a Federal Employers' Liability Act action to instruct the jury, in direct contravention of this Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), that it could *not* consider inflation when calculating future economic damages for the twenty-six year old totally disabled plaintiff.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	12
CONCLUSION	22
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

Bach v. Penn Central Transportation Company, 502 F.2d 1117 (6th Cir. 1974) 13

Culver v. Slater Boat Company, 722 F.2d 114 (5th Cir. 1983), *cert. denied* 467 U.S. 1252 (1984), 469 U.S. 819 (1984) 17

DeChico v. Metro-North Commuter Railroad, 758 F.2d 856 (2nd Cir. 1985) 18

Hunter v. Reardon Smith Lines, LTD, 719 F.2d 1108 (11th Cir. 1983), *cert. denied* 467 U.S. 1205 (1984) ... 17

Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983) ..... *passim*

Morvant v. Const. Aggregates Corp., 570 F.2d 626 (1978) 14

St. Louis Southwestern Railway Company v. Dickerson, 470 U.S. 409 (1985) 16

STATUTES

28 U.S.C. § 1254 2

28 U.S.C. § 1331 3

28 U.S.C. § 1337 3

45 U.S.C. § 51 ..... 2, 3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

————o————

Burns Scott Howard hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

————o————

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit (App. 1, *infra*) is reported at 812 F.2d 282 (1987). The decision of the United States District Court for the Eastern District of Kentucky (App. 15-16, *infra*) is unreported.

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JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on February 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

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STATUTES INVOLVED

This action was brought under The Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, et seq. Section 1 of the Act, 45 U.S.C. § 51, provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

STATEMENT

On August 4, 1981, petitioner Burns Scott Howard suffered severe back, head and shoulder injuries that, according to his treating physicians, totally and permanently disabled him, at age 26, from *any* gainful employment.[1] His injury occurred when he and two fellow employees were working as "yard skatemen" in respondent Chesapeake & Ohio Railway Company's coal yard in Russell, Kentucky, and were required to "tie up" coal cars after they had been "humped." In lay terms, coal cars would roll down an incline, through "retarders" to slow their speed, and then down along the tracks to where the skateman would mount them and apply their brakes. (App. 2, *infra*) On the evening of petitioner's accident, the coal cars were coming down the track excessively fast and the artificial lighting in the area where the men had to work was inadequate, making it difficult to see the moving coal car in the dark. (App. 2-3, *infra*)

As petitioner was waiting for a coal car on his assigned track, the car suddenly appeared out of the darkness; he grabbed hold of it and was jerked off his feet and dragged along the tracks. Afraid to let go for fear of falling underneath the car, petitioner held on until he tripped on something and fell from the car. Petitioner was knocked unconscious from the fall, and the next thing he remem-

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[1]Plaintiff's injury occurred in the course and scope of his employment with the respondent railroad, and his exclusive remedy for these injuries was therefore under the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq. Jurisdiction in the district court was based on 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1337 (federal statute regulating commerce).

bered was a co-worker walking up to him to see if he was hurt, a time period that was actually approximately 10 minutes. (TR. 54, 129-32)[2]

Petitioner subsequently saw numerous physicians for the back, left shoulder and head injuries he suffered when he fell from the coal car. Surgery was performed for petitioner's shoulder injury (App. 3, *infra*), but petitioner's lumbar disc injury was treated conservatively (TR. 240-41, 248, 251). His treating orthopedic surgeon testified at trial that both the shoulder and back injuries were permanent and disabled petitioner from "any gainful occupation." (TR. 257-58).

While petitioner's shoulder and back injury were themselves totally disabling injuries, his most serious injury by far was the brain damage he suffered in his fall from the coal car, when he was knocked unconscious. Petitioner was diagnosed with a post-traumatic syndrome, with major depression and anxiety. (App. 3, *infra*). As a consequence of this condition, petitioner suffered episodes of weeping, couldn't sleep, was estranged from people, and was not able to function sexually with his wife. Petitioner underwent extensive diagnostic testing to determine whether he had suffered brain damage, the most significant being the Luria Nebraska, which consists of 269 separate tests, each of which is a test of a specific micro behavior related to brain function. (TR. 287-95, 312, 319). Additional testing was performed using various "evoked potential" testing, and as a result of these tests, it was concluded that petitioner suffered a "dysfunctional damaged brain" that

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[2]TR. refers to the original trial transcript of proceeding.

affected the ability of his brain to process auditory and visual information. (TR. 324, 353-54, 378-79). Petitioner's physicians attributed his brain injury to his accident of August 4, 1981. (App. 3, *infra*)

Finally, it was the opinion of petitioner's treating physicians that he was permanently disabled from any occupational pursuit beyond a sheltered workshop type of situation, and further rehabilitation was impossible. (TR. 335-36).

The railroad responded to petitioner's medical evidence with two doctors who each saw petitioner solely for the purpose of testifying at trial. With respect to petitioner's left shoulder and low back injuries, the railroad's orthopedist thought petitioner's shoulder surgery had healed, that there were no residuals to the low back, and that from an *orthopedic* standpoint, petitioner was able to perform his work activities as a brakeman. (TR. 568-69). As a result of a Luria Nebraska test administered shortly before trial, the railroad's hired psychiatrist found that petitioner was *not* faking or exaggerating his injury (the opinion he had initially given) but *in fact* suffered from *brain dysfunction.* (TR. 401). However, this witness also testified to a laundry list of possible other causes of brain dysfunction (*none of which he examined for*) and he therefore concluded that petitioner's August 4, 1981 accident did not cause this brain dysfunction. (TR. 402, 406) (App. 3-4, *infra*) Still, the railroad's psychiatrist was of the opinion after his Luria Nebraska test that petitioner's I.Q. put him at the mental retardation level, and that his condition totally disabled him from *any* occupational pursuit. (TR. 417)

To prove the economic loss he suffered as a result of his total occupational disability, petitioner introduced the testimony of an economist, Dr. William E. Cobb, Ph.D., a Professor of Economics at the West Virginia College of Graduate Studies. (App. 4, *infra*) In calculating the present value of petitioner's future loss of earning capacity, Dr. Cobb used what is commonly referred to as the "real interest" method of analysis. Dr. Cobb explained how interest rates have closely paralleled inflation rates, and how historically the real interest rate has approximated one or two percent. (TR. 435). Dr. Cobb also explained the historical relationship between real interest and wage increases, and how wage compensation has historically stayed greater than inflation, about one or two percent. Looking at the historical wages of railroad workers and actual interest rates, Dr. Cobb determined that real compensation and real interest were almost completely offsetting. (TR. 436-37). Dr. Cobb then applied this analysis to reach two different estimates, a more liberal one assuming petitioner would work straight through to age 69, and the other, more conservative, taking into account the statistical possibilities of death or unemployment. Applying these two different assumptions, and taking into account the tax consequences of a lump sum award, Dr. Cobb reached two different present values. Using the assumption that petitioner would work straight through to age 69, Dr. Cobb calculated petitioner's economic loss at $2,784,540.00. Applying the more conservative approach, the present value of petitioner's after-tax loss equalled $1,705,475.00. (TR. 441-46) (App. 5, *infra*). To this future economic loss, Dr. Cobb added petitioner's wage loss between his August 4, 1981 accident and the time of trial, which totalled $101,380.00. (TR. 437).

With particular significance to the issue before this Court is Dr. Cobb's explanation of *inflation's impact* on petitioner's future economic loss. In his direct examination, Dr. Cobb explained how inflation, regardless of the particular percentage, is a *critical element* in calculating future loss.

> Q. And—Well, now, one thing would occur to the jury and to me, Doctor, and it's a standard question that I'm sure you are asked. When you say $1,705,475, what happens if you invest the money and how much interest can you earn if you put it in there at present safe rates? You would get a rather large figure. How can that represent his loss? Can you answer that?
>
> A. Yes. That is a question I am frequently asked, and, in fact, an issue I deal with quite frequently in my classes because it's a very easy mistake to make. If you assume, just for purposes, ten percent is not a bad rate. Right now if you invest in U.S. Treasury's you can get between eight and ten-and-a-half percent. So let's take ten percent which is a good round figure. If you invest $1,700,000 at ten percent, you would have $170,000 in interest a year. Your initial impression is. "Hey, $170,000 each year, every year if you invest at ten percent," and never touch the principal, that sounds like quite a windfall.
>
> Well, what that ignores is the fact that *inflation over the years eats into the principal and the interest.* Back to the chart that I had—if I can just remind you of that—what you can see from the chart is that over the long run, that ten percent interest is not going to be any greater than the wage increases you can expect. Historically, that's been true.
>
> I have taken into account the fact that you can earn high rates of interest, but only—*you can earn high rates of interest only in periods where there is high inflation.* That's always been true and always

will be true. *If there are periods of high inflation, then wages are going to be going up just as fast.* So, in effect, if you assume ten percent interest will be earned for 40 years—which I think is not a valid assumption—then you have to assume that wages are going to be going up probably ten percent too.

So it really doesn't make any difference whether you assume ten percent interest, or five percent interest, or 15 percent interest because *the major component of interest is inflation; and, in fact, if inflation is high, then wage growth will be high; if inflation is low, then wage growth will be low. Historically, that's been true.* ...

Q. So, are you saying eventually, *because of inflation and the wage pattern,* that the interest you invest will decline, that you will have to start biting into the principal?

A. That's exactly true; it's exactly the reverse of a home mortgage.

Q. Then if that—do you know about how far down the line that would be?

A. That happens about—after about 14 or 15 years.

Q. All right. Then from that year, from that period on to the end of his work life, would he be taking an even bigger bite into the principal?

A. An even bigger bite into the principal because in terms of purchasing power, the principal would be going down. Again, we're talking about what it will buy, not what the dollars are that remain. Ten years ago a dollar was worth considerably less—excuse me, more than it is today. So we're not concerned just what a dollar would be worth—will be in 40 years; *we're concerned with what the dollar will buy in 40 years.* (TR. 446-49) (emphasis added).

The railroad chose not to rebut Dr. Cobb's testimony with its own economist. Instead, its counsel, in his closing

argument, stated *his own analysis* of petitioner's future economic loss, an analysis which used the *market* interest rate and eliminated any effect of inflation.

> Now reasonableness: this man makes $16,000.00 a year, $16,237. What this means—*and the court will instruct you about this*—what that means is, how much money now invested in a good, safe security will give a return on that investment to justify it. If you believe Burns Scott Howard . . . then the key to it is that you give him the amount of money that would return $16,237. *Government bonds are returning about 10 1/2 to 11 percent; take 10 percent* . . . That means, ladies and gentlemen of the jury, that you would give him $150,000. Because that's about what it would—or give him $160,000.00, if you want to use a round number of 10 percent like we did the other day. He would get that money every year for the rest of his life; then when he died, he would still have $160,000 to leave to his wife and children. *This is what reduction of present worth means.* (Railroads closing argument, TR. 636-37) (emphasis added).

Over petitioner's objection (App. 8, *infra*) the trial court instructed the jury that it could *not* consider inflation in calculating future loss damages:

> In considering any element of damage to be experienced in the future, you are instructed that you should *not* take into account any possible effect o[f] present or future inflation one way or the other. (Court's Instructions, TR. 653) (emphasis added).

On July 23, 1985, the jury returned its verdict and found defendant negligent, petitioner free from contributory negligence, and assessed petitioner's damages at $100,000.00. (App. 8, *infra*). On July 31, 1985, petitioner filed a motion for a new trial on the basis that the trial court erred in instructing the jury that it could not

consider inflation in calculating future damages. (App. 8, *infra*) The defendant railroad made no post-trial motions. On November 8, 1985, the trial court, without issuing any opinion or memorandum, denied petitioner's motion, (App. 15, *infra*) and on December 4, 1985, petitioner filed his Notice of Appeal to the Sixth Circuit Court of Appeals. On February 17, 1987, the court of appeals affirmed the district court's denial of petitioner's motion for a new trial. (App. 1, *infra*)

The reasoning of the court of appeals was essentially a two-pronged approach. First, the court of appeals (noting a ruling by the trial court) appeared to suggest that plaintiff's economist had calculated an "obviously overblown estimate of damage," (App. 9, *infra*) and then explained why this may have accounted for the jury's verdict of $100,000.00.

> [I]t would not be surprising if the judge was reading his jury accurately when he intimated that the jury would think it absurd to award this plaintiff $1.5 million or more in respect of future earnings. The jury could have reasoned that if invested in long-term exempt municipal bonds paying 7% per annum, for example, a $1.5 million lump-sum award could be expected to yield more than $100,000.00 per year, and quite possibly leave plaintiff, at his death, still a millionaire (in dollars of the day) if he managed to avoid invading his capital for living expenses. In the Eastern District of Kentucky, at least, it will probably take a good many years of high inflation before most people will feel railroad hands cannot make do on less than $100,000.00 a year. (App. 9-10, *infra*)

Second, skirting the issue of whether the trial court's instruction not to consider inflation was error (App. 9, 10, *infra*), the court of appeals stated that it could have

"been potentially more confusing for the jury to be told it could take inflation into account than to be told otherwise," because of the "nature of the expert testimony" presented by plaintiff. (App. 10, *infra*) Referring only to that part of Dr. Cobb's testimony where he said that he "could not predict what the rate of inflation would be in the future" and that he "did not take inflation into account in projecting plaintiff's future earnings" (App. 10, *infra*), and having characterized Dr. Cobb as "having testified repeatedly that inflation made no significant difference," (App. 12, *infra*) the court of appeals relied on the fact that the trial court did not give a "reduction to present value" instruction (which the railroad requested in its jury instructions, but which was omitted by the trial court without objection by the railroad, (App. 8, *infra*) and stated:

> [W]e think it unnecessary to remand the case for a new trial in which the jury would be told both that it could take into account the possibility of future inflation and that projected future earnings must be discounted to their present value. Advice from the trial court as to these two countervailing considerations would have added little or nothing to the jury's deliberations, because plaintiff's evidence indicated that inflation and projected earnings is "washed out" by the inflation component of the interest rate used in present value calculations, and *inflation therefore makes no difference in the determination of the value of future earnings.* (App. 12-13, *infra*) (emphasis added)

Viewing the trial court's charge as permitting "the jury to award roughly 1.5 million dollars for future lost

earnings,"[3] the court of appeals stated it was not persuaded that the trial court's charge "entitles plaintiff to another shot at a higher verdict." (App. 14, *infra*)

———o———

REASONS FOR GRANTING THE WRIT

This writ should be granted because the court of appeals' decision represents a *complete departure* from the holding of this Court in *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983) that *inflation* is a *key element* in calculating future economic losses for an injured employee, and *must be considered* by the fact finder to ensure a fair and complete recovery. The Sixth Circuit's decision is a step backward, and now presents a *direct conflict* between that circuit and the rulings of this Court. With regard to the role of inflation in calculating petitioner's future damages, the trial court instructed the jury as follows:

> In considering any element of damage to be experienced in the future, you are instructed that you should *not* take into account any possible effect o[f] present or future inflation one way or the other. (Courts Instructions, TR. 653) (App. 8, *infra*) (emphasis added).

Petitioner timely objected to this instruction (App. 8, *infra*), and further raised this erroneous instruction as

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[3]Dr. Cobb testified that a rough approximation of his estimate of petitioner's estimated earning capacity could be made by multiplying his earnings in 1985 ($35,000) times his work life expectancy (43 years) (App. 6, *infra*). However, he also specifically testified he did *not* follow this approach. (TR. 437).

the sole issue in his motion for a new trial, which was denied by the trial court *without explanation* (App. 15, *infra*), and affirmed on appeal. (App. 1, *infra*).

It is difficult to discern the basis of the trial court's ruling inasmuch as it issued no memorandum explaining its decision. It is equally difficult to understand the Sixth Circuit's decision, as it represents not only a refusal to follow this Court's decision in *Jones & Laughlin,* but is contrary to its own decisions. Even though the role of inflation in determining future damages was much debated by the circuit courts before *Jones and Laughlin,* the *leading case* in the Sixth Circuit had already held (in an FELA case) that it was *reversible error* to instruct the jury that it could *not* consider inflation. *Bach v. Penn Central Transportation Company,* 502 F.2d 1117, 1122 (6th Cir. 1974). The trial court in *Bach* had excluded an economist's testimony on the precise wages the deceased employee would have earned in the future, and further charged the jury that it should *not* consider "future increases or decreases in the purchasing power of money." 502 F.2d 1122. The court of appeals upheld the trial court's exclusion of the economist's testimony on the *exact* future income the decedent would have received on the basis it was speculative, but, of prime importance here, held that the trial court committed *reversible error* in instructing the jury *not to consider inflation.*

> We do not hold, however, that the jury may never consider inflation and future increases in income in determining damages. Ideally, the damage award should compensate appellant for the financial loss she will suffer as a result of the death of her husband. If a jury is not permitted to consider decreases in the purchasing power of money, appellant would be woefully damaged if inflation should continue at its present or

> at any other substantial rate. Some consideration of probabilities is inevitable in any fair award of damages. The court's role is to keep such extrapolations within reasonable bounds and insure that they conform to the evidence. (Cite omitted)
>
> Even though no expert testimony on inflation and future increases was admitted, *it was still error* for the district court to charge the jury that it *should not consider 'future increases or decreases in the purchasing power of money.'* (Cite omitted) Inflation is a fact of life within the common experience of all jurors. Admittedly, if the jury considers this issue without expert testimony, their calculations will be even more imprecise. There is always a chance that the verdict may be too generous. *But if jurors should be prohibited from applying their common knowledge of inflation in reaching a verdict, the party entitled to recovery could be grievously under-compensated.* The court can always rectify an exorbitant verdict through its power of remittitur. 502 F.2d 1122 (emphasis added).

While it was thus clear error for a court in the Sixth Circuit to instruct a jury after *Bach v. Penn Central* that it could not consider inflation (as the trial court did here), *see, Morvant v. Const. Aggregates Corp.*, 570 F.2d 626 (1978), the full extent to which economic testimony could be introduced on the subject remained somewhat unclear in the Sixth Circuit and others. In 1983, this Court finally stepped into the picture and in the landmark *Jones and Laughlin* ruling, established the guidelines by which inflation should be considered in calculating future damages. Pointing to cases where consideration of inflation was disallowed on the basis it was speculative, this Court explained:

> *The effect of these holdings was to deny the plaintiff the benefit of the impact of inflation on his future earnings, while giving the defendant the benefit of*

> *inflation's impact on the interest rate that is used to discount those earnings to present value.* Although the plaintiff in such a situation could invest the proceeds of the litigation at an "inflated" rate of interest, the stream of income that he received provided him only with enough dollars to maintain his existing *nominal* income (emphasis in original); it *did not provide him with a stream comparable to what his lost wages would have been in an inflationary economy.* This inequity was assumed to have been minimal because of the relatively low rates of inflation.
>
> In recent years, of course, inflation rates have not remained low. There is now a concensus among courts that the prior inequity can no longer be tolerated . . . There is no concensus at all, however, regarding what form an appropriate response should take. 462 U.S. at 540-41 (emphasis added) (Cites and footnotes omitted).

This Court then engaged in an extensive analysis of the three prevailing economic theories by which inflation could be taken into account in fairly calculating lost future earnings. Under the first of these theories, the "real interest rate" approach (which was that applied by Dr. Cobb in the instant case), market interest rates (i.e. those that now hover somewhere in the 10 percent range) are assumed to include two components, an estimate of anticipated inflation and the desired "real" rate of return on investments—the real rate of return essentially constant over time. The effect of inflation on future increases in earnings are therefore perfectly offset by all but the "real" component of the market interest rate. 462 U.S. at 541-42.

Under the second of these theories, the "total offset" method (which is actually a number of similar theories using the same approach), the market interest rate is considered fully offset by future price inflation, and other sources of future wage increases. 462 U.S. at 544-46.

The third and final method uses market interest rates (i.e. the 10 percent range) to determine present value, but also permits evidence of what future price inflation will be in estimating the lost stream of future income. Under this approach, the actual estimates of future wage inflation are allowed. 462 U.S. at 543.

This Court in *Jones and Laughlin* declined to adopt any of these methods as the "exclusive method in all Federal trials for calculating an award for lost earnings in an inflationary economy", but instead chose only to "define the general boundaries within which a particular award will be considered legally acceptable." 462 U.S. at 547. While this Court gave approval to all three methods, it discouraged the method by which the actual market interest rate is used as the discount rate, and the trier of fact relies upon a specific forecast of the future rate of price inflation. Instead, it favored the "real interest rate" approach (using a rate between 1 and 3 percent) and the total offset approach. In each case, *inflation,* while not specifically predicted by percentage rate, *furnishes the primary basis for the offset.* 462 U.S. at 547-50.

This Court's most recent pronouncement on the significance of inflation in calculating future damages in FELA cases is found in *St. Louis Southwestern Railway Company v. Dickerson,* 470 U.S. 409 (1985). In *Dickerson,* the Missouri Court of Appeals refused to give the railroad's requested present value instruction, on the basis that no such instruction was required under Missouri state law. Reversing, this Court held that *federal* substantive law governs damages in FELA cases, and that under long-standing federal law, a defendant railroad is entitled to a present value instruction. Of critical importance to the

instant case, this Court referred to its decision in *Jones and Laughlin* and stated:

> Although our decision in *Jones and Laughlin* makes clear that no single method for determining present value is mandated by federal law and that the method of calculating present value *should take into account inflation* and other sources of wage increases as well as the rate of interest, it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damage award is error. 470 U.S. at 412 (emphasis added).

Thus, while this Court has not ruled that a particular economic theory must be used in calculating the present value of lost future earnings, each approved method has one common component—*the effect of inflation.* Subsequent federal circuit court decisions have followed *Jones and Laughlin's* lead, and held that inflation must be taken into account in one manner or another. In *Culver v. Slater Boat Company,* 722 F.2d 114 (5th Cir. 1983) (*Culver* II), *cert. denied* 467 U.S. 1252 (1984), 469 U.S. 819 (1984), the Fifth Circuit noted that the Supreme Court in *Jones and Laughlin* confirmed the Fifth Circuit's holding in *Culver* I, 688 F.2d 280 (5th Cir. 1982) "that the fact finder *should* consider inflation in determining an appropriate damage award." 722 F.2d at 117 (emphasis added). Similarly, in *Hunter v. Reardon Smith Lines, LTD,* 719 F.2d 1108 (11th Cir. 1983), *cert denied* 467 U.S. 1205 (1984), a longshoreman in a personal injury action against a ship owner was granted a new trial based on the trial court's refusal "to permit expert testimony or to instruct the jury regarding the effect of future inflation on the award of future damages." 719 F.2d at 1114.

Finally, in a FELA case where the trial judge *failed to instruct* the jury to consider inflation (as compared with

the trial court's instruction here that the jury could *not* consider inflation), the Second Circuit reversed and remanded for a new trial *limited* to the question of *damages*. *DeChico v. Metro-North Commuter Railroad*, 758 F.2d 856 (2nd Cir. 1985).

As a direct consequence of the trial court's instruction not to consider inflation, the jury had no choice but to *totally disregard* the testimony of petitioner's economist, Dr. Cobb, because inflation made up an integral part of his calculations. The jury was also thus instructed to totally disregard petitioner's closing argument to the jury on damages, in which his counsel, in reliance on Dr. Cobb's testimony, explained the effects of inflation. (Plaintiff's Closing Argument, TR. 642-43).

With inflation's impact *totally removed* from the jury's consideration by the trial court's instruction, it was left with *only* the 10 percent *market rate* of interest suggested by the railroad's counsel in his closing argument without also being able to consider inflation's effect on wages and prices:

> then the key to it is that you give him the amount of money that would return $16,237.00. Government bonds are returning about 10½ to 11 percent; take 10 percent . . . That means, ladies and gentlemen of the jury, that you would give him $150,000.00. Because that's about what it would—or give him $160,000.00, if you want to use a round number of the 10 percent like we did the other day. He would get that money every year for the rest of his life; then when he died, he would still have $160,000.00 to leave to his wife and children. This is what reduction of present worth means. (Defendant's Closing Argument, TR. 636-37).

In light of this Court's decision in *Jones and Laughlin*, it is obvious that the argument made by the railroad's counsel is a gross distortion of economic theory and highly misleading, so much so that it must be held unsound and contrary to *Jones and Laughlin* as a matter of law. Unfortunately, to a jury unsophisticated in basic economics, it may have some superficial appeal, and when viewed in conjunction with the trial court's instruction which eliminated the effects of inflation at the very heart of petitioner's economic testimony, it is certainly not surprising to see a jury verdict as low as was returned here.

The court of appeals unfortunately made this same mistake as the trial court, where it misinterpreted the modern economic theories explained by this Court in *Jones and Laughlin*. The court of appeals' mistake is best seen in their apparent misunderstanding of Dr. Cobb's testimony of petitioner's future wage loss, where the court implied that a 1.5 million dollar lump-sum award "could be expected to yield more than $100,000.00 per year and quite possibly leave plaintiff, at his death, still a millionaire (in dollars of the day), if he managed to avoid invading his capital for living expenses." (App. 9-10, *infra*) Dr. Cobb was very explicit in his testimony that *inflation* is in fact a *critical focus* of his calculations. He testified that inflation "over the year eats into the principal and the interest" and that you "can earn high rates of interest only in periods where there is high inflation." (TR. 447) According to Dr. Cobb's trial testimony, "*at the end of the work life there is zero dollars left.* That's the primary principle on which all the calculations are based." (emphasis added) (TR. 448).

The court of appeals' decision ultimately rests on its assumption that the trial court's instruction not to con-

sider inflation was balanced out by the lack of a present value instruction, and that the jury therefore *failed to discount to present value.* This ignores the fact that (as acknowledged by the court of appeals) the railroad argued that petitioner could invest his money at 10 percent per annum, and that an award of $160,000.00 would give petitioner $16,000.00 a year for life and still leave $160,000.00 for his family at his death. (App. 7, *infra*) However, Dr. Cobb's testimony clearly rejected this superficial and unsophisticated analysis, because a critical part of his calculations was that inflation was taken out of *both sides* of his calculations, both in calculating *future earnings* and in determining the *interest rate* to discount to present value. Taking inflation out of the earning side of the calculations (by virtue of the trial court's instruction) without *also* taking it out of the present value side of the instructions (by virtue of the inflationary component of the market interest rate) results in the exact unfair circumstance warned against by this Court in *Jones and Laughlin,* 462 U.S. at 540, where the railroad had the *benefit* of inflation by virtue of a high interest rate, a benefit *denied* to petitioner in his lost earning calculations. To put it a simpler way, the full brunt of inflation's impact was used *against petitioner* by the jury's use of a market interest rate riddled with inflation. With the court's instruction in mind, it is no wonder that the jury could conceivably (and erroneously) believe that $100,000.00 was in fact a fair and adequate award to petitioner for *all of his future damages.*

While it is not possible to determine the precise amount by which the jury's verdict undercompensates petitioner, there can be no question that it in fact does. Petitioner, only 26, has a 40 plus year work life expectancy, and

it cannot be said as a matter of law that the effects of inflation during this time will be insignificant. Indeed, the most important economic questions faced by courts today concern the proper manner of dealing with inflation in calculating future damages. The economic testimony presented here by Dr. Cobb fits squarely within that permitted by this Court in *Jones and Laughlin v. Pfeifer*, and it was reversible error for the trial court to strip away its very foundation by its instruction not to consider inflation.

Following *Jones and Laughlin, not a single case,* other than the instant one, has approved an instruction *not* to consider inflation. To allow the decision of the court of appeals to stand here invites other trial courts to instruct juries *not* to consider inflation. The effect would be to undermine *Jones and Laughlin,* and return the role of inflation in calculating future damages to the chaotic and confused environment that existed in the lower courts prior to *Jones and Laughlin.*

In summary, the trial court's instruction to the jury that it could not consider inflation in calculating future damages was a single error with enormous, incalculable consequences. Petitioner, at age 26 ,was permanently and totally disabled not only by a low back and shoulder injury, but more significantly, by brain damage that lowered his I.Q. to the level of mental retardation. At age 26, petitioner had one day in court; yet he was awarded damages by a jury that was *specifically instructed* not to take into account the *single most important factor* in fairly and accurately calculating damages for the rest of his life—that of inflation. Not only had the Sixth Circuit previously ruled that an instruction such as was given by the trial

court here is reversible error, but this Court has twice ruled in recent decisions that inflation is a *critical element* under *any* economic theory of computing future damages. It is impossible to reach any conclusion other than that this instruction resulted in a vastly diminished jury award to plaintiff, an error that can only be remedied by a new trial on the issue of damages.

More importantly, allowing the court of appeals' decision to stand will invite other courts to further undermine *Jones and Laughlin Steel Corp. v. Pfeifer*, and reintroduce to the calculation of future damages the confusion which *Jones and Laughlin* was intended to end.

CONCLUSION

Plaintiff therefore respectfully requests that this Court grant this Petition for a Writ of Certiorari and review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

Burns Scott HOWARD,

Plaintiff-Appellant,

v.

The CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant-Appellee.

No. 85-6106.

United States Court of Appeals, Sixth Circuit

Argued Oct. 16, 1986.

Decided Feb. 17, 1987.

Frank H. Warnock, Warnock and Warnock, Greenup, Ky., Ralph E. Koenig (argued), Minneapolis, Minn., Michael L. Weiner, for plaintiff-appellant.

Paul Hobbs (argued), Ashland, Ky., for defendant-appellee.

Before NELSON and RYAN, Circuit Judges, and ENSLEN, District Judge.

DAVID A. NELSON, Circuit Judge.

Dissatisfied with a $100,000 jury verdict he recovered in a Federal Employers' Liability Act action against the defendant railroad, plaintiff Burns Scott Howard has appealed the judgment entered on that verdict. Although the trial court declined to give a jury instruction requested by the defendant railroad to the effect that future earnings ought to be discounted to their present value, should the jury decide to award damages for loss of future earning capacity, plaintiff contends that the trial court nonetheless erred in instructing the jury to disregard the effect of inflation in considering any such award. Finding, on the particular record before us, no prejudicial error, we shall affirm the judgment.

I

Plaintiff Howard, who was 26 years old at the time of trial in mid-1985, was graduated from high school in 1977. He went to work for the railroad in the summer of 1978, and worked there full-time (except for periodic furloughs occasioned by economic conditions) until August 4, 1981, when he was allegedly injured in an accident. He did not work thereafter.

Plaintiff's evidence showed that on the night in question he was working as a "skateman" in a rail yard, where his job was to climb aboard moving coal cars and bring them to a stop by setting their handbrakes; that the cars were being sent down the classification tracks at an excessive rate of speed, the yard was not adequately il-

luminated, and the work area had debris in it; and that plaintiff lost his footing as he tried to climb aboard one of the cars, tripped over a piece of debris, and fell to the ground, injuring his left shoulder, arm and rib cage. Plaintiff was taken to the office of a trainmaster, who, after making a visual inspection for injuries, drove him to a nearby hospital. The hospital charts and accident reports filled out at the time indicated no loss of consciousness and no head injury; plaintiff seemed mentally alert, and the pupils of his eyes were not dilated. He subsequently contended, however, that the accident—which was not witnessed by anyone else—must have knocked him unconscious.

Plaintiff went home after having been seen in the hospital emergency room, but he was hospitalized two days later for back and shoulder pain. An orthopedic surgeon operated on his shoulder in May of 1982. By the summer of that year plaintiff was showing signs of mental depression. In January of 1983 a psychiatrist saw him and made a diagnosis of post-traumatic syndrome, with major depression and anxiety. In 1985 a neuropsychologist made a diagnosis of brain dysfunction; that diagnosis was subsequently confirmed by other experts, including a psychiatrist who examined plaintiff for the defendant railroad.

The evidence was in dispute as to whether the brain dysfunction diagnosed in 1985 could be said, with reasonable medical certainty, to have been caused by the accident plaintiff claimed to have suffered in 1981. Plaintiff's expert witnesses opined that there was a direct causal relationship, and the defendant railroad's expert denied that any such causal relationship relationship had been established. The defendant's expert testified that although

plaintiff's condition might possibly have been caused by a fall that knocked him out, the condition could also have been the result of intercerebral multiple sclerosis, Alzheimer's disease, a brain tumor, a blood clot, meningitis, infection, deoxygenation of the brain during general anesthesia, or various other causes that had not been ruled out. Plaintiff's lawyers argued to the jury that the brain damage was "the real thing in this case . . . the most devastating injury of all," and a major question before the jury was whether plaintiff had in fact shown that he suffered from brain damage caused by his alleged fall at work.

The defense presented testimony from a union official, one Frank Davis, to the effect that plaintiff had complained, several weeks before the alleged accident, of having hurt his left shoulder while doing farm work. Mr. Davis testified that there had been discussion of the possibility of plaintiff's receiving disability payments from the railroad on account of his shoulder condition, and that he (Davis) had made an anonymous telephone call to a railroad claim agent to suggest that plaintiff's claim was fraudulent. Mr. Davis' testimony was vigorously challenged on cross-examination, and other employees who were supposed to have heard the original conversation denied that it had taken place.

With respect to plaintiff's earnings prior to the accident, plaintiff did not disagree with records showing that his railroad wages (exclusive of the value of fringe benefits) had been $5,122 in 1978, $8,587 in 1979, $16,237 in 1980, and $9,969 in 1981. Through an economist, Dr. William Cobb, plaintiff presented evidence that the fringe benefits and wages lost thereafter up to the beginning of the month in which the trial was held, July of 1985, had

come to slightly over $100,000. The railroad made no significant attempt to suggest that this $100,000 actual earnings loss figure was not accurate.

Dr. Cobb also testified on what plaintiff's future earning capacity would have been had he not been permanently disabled at the time of trial. Dr. Cobb explained that he had attempted to estimate the future "real" wage increases that the plaintiff would have received over the course of a normal working career with the railroad, expressing those increases in constant 1985 dollars without any element of inflation. Dr. Cobb said he also attempted to determine the present value of that stream of future earnings, discounting the earnings at an unspecified "real" interest rate that might have obtained in an environment free of inflation and of any expectation of inflation. With adjustments for anticipated taxes on both the wages plaintiff could have been expected to earn if he had remained at work and the income he could be expected to receive on a lump sum damage award, and with further adjustments for what Dr. Cobb believed to be reasonable (but unspecified) assumptions as to life expectancy, furlough rates, risk of illness or job loss because of economic conditions, and so forth, Dr. Cobb testified that in his opinion the present value of the loss of future wages and fringe benefits experienced by a permanently disabled 26 year old railroad worker with the plaintiff's earnings history and seniority would be slightly over $1.7 million.

Asked on cross-examination if there was a prediction of future price inflation in any portion of his calculations, Dr. Cobb testified that there was only one place in his economic model where it had been necessary to use an estimate for inflation: that was in projecting the taxes on the in-

come from a hypothetical lump sum damage award. The inflation rate used in this connection, Dr. Cobb testified, was 7.24% per annum, carried out through the year 2028.

Dr. Cobb did not say what figure his economic model would have yielded had he assumed an inflation rate of zero, but he did testify that a rough approximation of the value of plaintiff's earning capacity could be arrived at by taking $35,000 a year (plaintiff's estimated wages plus fringe benefits for the first half of 1985 having come to about half that amount) and simply multiplying $35,000 by the remaining number of years plaintiff might have worked. Assuming, as Dr. Cobb invited the jury to do, that plaintiff would have worked 43 more years, this computation (43 X $35,000=$1,505,000) would peg the future earning loss at roughly $200,000 below the figure produced by the more sophisticated economic model. The jury could thus have inferred that if Dr. Cobb has assumed no inflation when he made his sophisticated present value calculation, he would have come up with an estimated earning loss of roughly $1.5 million as opposed to $1.7 million.

The reason inflation did not play a bigger part in Dr. Cobb's calculations, as he explained, was that in his view the market rate of interest appropriately used in making a present value calculation approximates the percentage rate at which wages can be expected to rise in the future. Inflation rates have historically been a major component of interest rates, Dr. Cobb said, and whatever assumptions are made about the course of future inflation, inflation should not be a significant factor in the calculation of economic loss: the inflation element in the present value caluculation offsets the inflation element in the calculation of future earnings. "[D]espite all the rigamarole of trying to

find what inflation is," he testified, "how much you discount it in terms of the interest that will be earned, almost all of that washes out." When asked, on cross-examination, if he claimed to be able to predict what the inflation rate will be 10, 15 or 20 years from now, Dr. Cobb answered "No. I'm saying, in fact, it doesn't make any difference. . . ."

The defendant railroad did not call any economist to the stand, and in final argument to the jury the railroad's counsel spent most of his time attempting to minimize the extent of the plaintiff's physical and mental problems and arguing that they were not the result of the alleged accident. Defense counsel devoted only three transcript pages of argument to the question of economic damages. Pointing out that plaintiff's actual wages in his last full year of employment had been about $16,000, counsel argued that if the jury awarded $160,000, and if plaintiff invested that amount at 10% per annum and never invaded the principal, plaintiff could receive a lifetime income of $16,000 per year and still leave $160,000 to his wife and children at his death. Plaintiff's counsel did not object to this argument.

The jury was charged by the trial court that if plaintiff were found to have been injured as a consequence of the defendant railroad's negligence, the jury should assess as damages no more and no less than the amount found, by a preponderance of the evidence, to be full, just and reasonable compensation for all of the loss so caused. Among the elements of damage the jury was told it should consider, to the extent it found them proved by a preponderance of the evidence, were "any earnings or working time lost in the past and any loss of ability to earn money in the

future. . . . " In considering any element of future damage, the trial court continued, "you are instructed that you should not take into account any possible effect [of] present . . . or future inflation one way or the other." The jury was also told that any award would not be subject to income taxes, "and you should not consider any such taxes in fixing the amount of your award. . . . "

Significantly, the jury charge did not include an instruction, requested by the defendant railroad, on reducing future earnings to present value—this despite the fact that in a colloquy outside the presence of the jury, the trial judge and counsel for both of the parties had all agreed that there must be a reduction of future earnings to present value. Counsel for the railroad did not specifically renew his request for a present value instruction after the charge had been given, but plaintiff's counsel specifically objected to the instruction that the jury "should not take into account any possible effect of present or future inflation one way or another." The court declined to change its instructions.

The jury returned a verdict for the plaintiff and against the defendant railroad, assessing the plaintiff's actual damages in the amount of $100,000. There were no special interrogatories, and the jury was not asked to state whether it found the accident had caused any disability likely to extend beyond the time of trial. The plaintiff moved for a new trial on damages, contending that the jury should not have been instructed to disregard inflation in determining future damages. The motion for a new trial was denied without opinion, and this appeal followed.

II

A claimed earnings loss of over $100,000 having already accrued by the time of trial, it may seem inherently improbable that the jury's award of damages totaling $100,000 was intended to include anything at all for loss of future earning power. The jury was not obliged to find the defendant railroad responsible for any disability that may have existed at the time of trial, of course, and if the jury intended to award nothing for loss of future earnings, it is immaterial whether instructional error might have led the jury to think the maximum allowance for loss of future earning capacity was "roughly" $1.5 million rather than $1.7 million.

Regardless of whether there were technical errors in the court's charge on the evaluation of future earning capacity, moreover, the trial judge may well have been correct in suggesting, as he did in overruling a motion by the railroad to strike the economist's testimony in its entirety, that "if the Plaintiff wishes to spread their blanket clear across the courtroom" with an obviously overblown estimate of damages, "that will be to [the defendant's] advantage ultimately." The jury may or may not have been better equipped than Dr. Cobb was to guess the course of future inflation, and the jury probably had no idea of how to go about making present value calculations itself, but it would not be surprising if the judge was reading his jury accurately when he intimated that the jury would think it absurd to award this plaintiff $1.5 million or more in respect to future earnings. The jury could have reasoned that if invested in long term tax exempt municipal bonds paying 7% per annum, for example, a $1.5 million lump sum award could be expected to yield more than

$100,000 per year and quite possibly leave plaintiff, at his death, still a millionaire (in dollars of the day), if he managed to avoid invading his capital for living expenses. In the Eastern District of Kentucky, at least, it will probably take a good many years of high inflation before most people will feel railroad hands cannot make do on less than $100,000 a year.

Still, the thought processes of juries in Eastern Kentucky are no more susceptible to divination by outside agencies than are those of juries elsewhere, and we need not rest our decision on the proposition that any instructional error committed by the trial court in this case was harmless. Given the nature of the expert testimony presented here, and in view of the court's failure to give a present value charge, we think it would have been potentially more confusing for the jury to be told it could take inflation into account than to be told otherwise.

Conceptually, to be sure, it would have been perfectly appropriate for the plaintiff's expert witness to have factored inflation (or deflation) into his future earnings estimate, if there had been some rational basis for predicting what the future inflation or deflation would amount to and when it would occur, and if the witness discounted the projected future earnings by an interest rate reflecting comparable assumptions as to the future course of the dollar. This is not what Dr. Cobb claimed to have done, of course: he admitted that he could not predict what the rate of inflation would be in the future, he said he did not take inflation into account in projecting plaintiff's future earning, and he said he did not discount those earnings to present value with the kind of interest rate likely to obtain in

a world where investors assume there is at least some risk of inflation.

If plaintiff had proffered testimony to the effect that inflation could be expected to push his earnings up for 40 years or more at a compound annual rate of more than 7% (that being the inflation rate assumed by Dr. Cobb for one relatively minor part of his economic model), such testimony might have been subject to objection—at least if plaintiff's expert wintess did not use a correspondingly high discount rate in reducing estimated future earnings to their present value. See *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir.1970), *cert. denied,* 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153 (1971) and *Bach v. Penn Central Transportation Co.,* 502 F.2d 1117 (6th Cir.1974), where this court indicated that testimony projecting significant wage increases far into the future is so speculative as to be inadmissible. Even if such testimony is inadmissible, however, it is well established that the jury may normally consider the possibility of future increases or decreases in the purchasing power of money. Thus in *Bach v. Penn Central Transportation Co.,* 502 F.2d 1117, *supra,* we held that "[e]ven though no expert testimony on inflation and future increases was admitted, it was still error for the district court to charge the jury that it should not consider 'future increases or decreases in the purchasing power of money.' " *Id.* at 1122. *Cf. Morvant v. Construction Aggregates Corp.,* 570 F.2d 626 (6th Cir.), *cert. dismissed,* 439 U.S. 801, 99 S.Ct. 44, 58 L.Ed.2d 94 (1978), where we held it was reversible error to exclude expert testimony on the prospect of future wage increases.

It is equally clear, on the other hand, that the plaintiff in an FELA case is not entitled to recover more, in respect

of lost future income, than the present value of such income, and the jury ought to be so advised. *St. Louis Southwestern Railway Co. v. Dickerson,* 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). To let the jury take the prospect of future inflationary wage increases into account without clear guidance on the need for reducing future earnings to their present value would be grossly unfair to the defendant.

That unfairness would be particularly striking in the case at bar, where the only inflation rate ever mentioned was 7.42%, and where the jury, unless cautioned otherwise, could have inferred it was free to project that rate into the future for a period of 40 years or more. Without a proper present value instruction, this could have led to utterly ludicrous results—particularly in view of Dr. Cobb's testimony that a rough approximation of the earning loss could be arrived at by aggregating undiscounted annual earnings. In describing that rough approximation technique, which corresponds to the "total offset" approach discussed in *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), Dr. Cobb did not intend to suggest, of course, that it would be appropriate to aggregate annual earnings after they had been adjusted upward for inflation. On the record of this case, however, Dr. Cobb having testified repeatedly that inflation made no significant difference, the jury might well have been confused by an instruction inviting it to take inflation into account.

Because of Dr. Cobb's testimony, we think it unnecessary to remand the case for a new trial in which the jury would be told both that it could take into account the possibility of future inflation and that projected future earn-

ings must be discounted to their present value. Advice from the trial court as to these two countervailing considerations would have added little or nothing to the jury's deliberations, because plaintiff's own evidence indicated that inflation in projected earnings is "washed out" by the inflation component of the interest rate used in present value calculations, and inflation therefore makes no difference in the determination of the value of future earnings. (We note also that although the "total wash-out" or "total offset" concept has not been accepted as a mandatory federal rule of decision, it is prominently featured on the menu of economic theories from which courts may currently choose in FELA cases. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768, *supra.* The "total offset" method of calculating the present value of future earnings depends on the validity of the method's implicit assumptions as to the relationship between the future course of wage rates and the future course of interest rates, and the time may come when those assumptions will be thought so wide of the mark that the method will have to be abandoned. In the case at bar, however, there is affirmative—and uncontradicted—evidence that the assumptions are currently tenable).

A federal appellate court reviewing a challenge to jury instructions is "required to judge the charge as a whole and to affirm the jury verdict if, taken as a whole [the trial court's charge] fairly presents the law as it applies to the case at hand." *Haislah v. Walton,* 676 F.2d 208, 212 (6th Cir.1982). Taking as a whole the charge given in this case, and considering it in relation to the evidence that was before the jury, we think the judgment entered on the jury's verdict ought to be affirmed. The charge

as given would have permitted the jury to award roughly $1.5 million for future lost earnings, if the jury had taken all of plaintiff's evidence at face value, and we are not persuaded that the charge, read in the light of the testimony, entitles plaintiff to another shot at a higher verdict.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 84-116

BURNS SCOTT HOWARD, PLAINTIFF,

VS. ORDER

(Filed November 8, 1985)

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, DEFENDANT.

This matter is before the Court on plaintiff's motion for a new trial, and defendants response to the motion, and being sufficiently advised.

IT IS ORDERED that plaintiff's motion for a new trial is DENIED.

This 7 day of November, 1985.

/s/ Henry R. Wilhoit, Jr.
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CATLETTSBURG CIVIL ACTION NO. 84-116

BURNS SCOTT HOWARD, PLAINTIFF,

VS.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, DEFENDANT.

JUDGMENT ON A JURY VERDICT

(Filed July 23, 1985)

This action came on for trial before the Court and a jury, Honorable Henry R. Wilhoit, Jr., Judge, presiding, and the issues having been duly tried and the jury duly rendered its verdict.

IT IS ORDERED AND ADJUDGED,

That the Plaintiff, Burns Scott Howard, recover of the Defendant, The Chesapeake & Ohio Railway Company, the sum of $100,000.00, with interest thereon at the rate of 7.60 per cent as provided by law, and his costs of action.

Dated at Ashland, Kentucky, this 23rd day of July, 1985.

LESLIE G. WHITMER
CLERK

BY: /s/ Christina M. Venoy
Deputy Clerk

Supreme Court, U.S.
FILED
JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1846

In The
Supreme Court of the United States
October Term, 1986

BURNS SCOTT HOWARD,

Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

When the total award by the jury of $100,000 was less than the accrued wage loss at the time of trial, and future economic damages were not awarded by the jury, is there a special or important reason to review on Writ of Certiorari a Judgment in a Federal Employers' Liability Act case where the trial court instructed the jury not to consider any possible effect of inflation and did not give an instruction on reduction to present value?

IN THE UNITED STATES SUPREME COURT
CASE NO. 86-1846

BURNS SCOTT HOWARD, PETITIONER,

vs: *RULE 28.1 LISTING*

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation, RESPONDENT.

The Chesapeake and Ohio Railway Company is a wholly owned subsidiary of CSX Corporation, Richmond Virginia.

The following is a listing of the subsidiaries (except wholly owned subsidiaries) and affiliates of the respondent, The Chesapeake and Ohio Railway Company, and of CSX Corporation:

Augusta and Summerville Railroad Company
Beaver Street Tower Company
Central Transfer Railway and Storage Company
Chatham Terminal Company
North Charleston Terminal Company
Paducah & Illinois Railroad Company
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company
Allegheny and Western Railway Company
The Baltimore and Philadelphia Railroad Company
Clearfield and Mahoning Railway Company
The Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
The Home Avenue Railroad Company
The Baltimore and Cumberland Valley Rail Road Extension Company
Richmond-Washington Company ("R-W")
Richmond, Fredericksburg and Potomac Railroad Company
Mid Allegheny Corporation ("MAC")

The following is a listing of Joint Ventures of CSX Corporation and its subsidiaries and affiliates:

Arabian Container Terminals, Limited
Asia Terminals Limited
Entremar, S.A.
Sea-Land Container Terminal Administration Co., Ltd.
World Feederships, Inc.
Energy Dominion
Gemetal Distribution Services Company
Glebe Road Associates
Glebe Road II Associates
Glebe Road III Associates
Glenway Associates
LightNet
Richmond Center Associates
St. George Seaport Associates

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
RULE 28.1 LISTING	ii
TABLE OF AUTHORITIES	v
OPINION BELOW	2
COUNTERSTATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	13
ARGUMENT	14
CONCLUSION	21
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Bach v. Ucho, 697 F.2d 741 (6th Cir. 1983) 15

Blackwell v. Sun Electric Corp., 696 F.2d 1176 (6th Cir. 1983) 15

Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30 (2nd Cir. 1980) 17

Flanigan v. Burlington Northern, Inc., 632 F.2d 880 (8th Cir. 1980) 15

Haislah v. Walton, 676 F.2d 208 (6th Cir. 1982) 15

Jones & Laughlin Steel Corp. v. Pfeifer, 103 S.Ct. 2541 (1983) 21

Kotteakos v. United States, 328 U.S. 750 (1946) 14, 18, 19

Lewis v. Strickland Truck Lines, 505 F.2d 164 (6th Cir. 1974) 14

Rodgers v. Fisher Body Div., G.M.C., 739 F.2d 1102 (6th Cir. 1984) 16

Teal v. E. I. DuPont De Nemours and Co., 728 F.2d 799 (6th Cir. 1984) 14

Westwood Chemical, Inc. v. Owens-Corning Fiberglass, 445 F.2d 911 (6th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972) 15

STATUTES:

28 U.S.C. 2111 14

45 U.S.C. 51, *et seq.* 5

OTHER AUTHORITIES:

5A C.J.S. *Appeal and Error*, 1773(2) 19

75 Am.Jur.2d, *Trial*, 923 19

TABLE OF AUTHORITIES—Continued

Page

COURT RULES:

Rule 61, Federal Rules of Civil Procedure 14

Rule 17.1, Supreme Court Rules 14

No. 86-1846

In The

Supreme Court of the United States

October Term, 1986

BURNS SCOTT HOWARD,

Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, The Chesapeake and Ohio Railway Company, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking reversal of the Sixth Circuit's opinion in this case.

OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported at 812 F.2d 282 (1987). (App. 1)

———o———

COUNTERSTATEMENT OF THE CASE

The Respondent sets forth the following Counter-statement of the case because the statement of facts set forth in petitioner's Petition for Writ of Certiorari are not consistent with the evidence that was introduced in the trial of this case and considered by the Court below.

The petitioner, Burns Scott Howard, was hired by the respondent on July 24, 1978, and is a member of the United Transportation Union.

In July, 1981, the petitioner told Frank H. Davis, local chairman for the Fireman, United Transportation Union, and Assistant General Chairman of the United Transportation Union, Russell, Kentucky, that he had hurt his shoulder on his farm either putting up hay or tobacco in his barn.

Approximately two to three weeks after the first conversation, the petitioner was still complaining about his left shoulder to the union officer. (TR 535-538)

On August 4, 1981, approximately three weeks after the first conversation with the union officer and approximately one week after the second conversation with the union officer, the petitioner claimed that he sustained an injury while working for the respondent as a skateman. He

claimed that as he attempted to mount a railroad car, he tripped over a tie plate lying in the walkway beside the tracks. There were no witnesses to the alleged accident. (TR 129-130)

The petitioner reported the accident to his supervisor, who observed that the petitioner's eyes were clear, his pupils were not dilated, there was no blood or scratches of any type on his face or head, the petitioner was clear-headed and had no difficulty with his memory, and the petitioner did not tell his supervisor that he had been rendered unconscious or injured his head in the accident. (TR 499)

At the waiting room of the hospital, the petitioner and his supervisor filled out approximately half of the accident report, in which the petitioner gave his name, Social Security number, Railroad ID number, address, job location, railroad department, the location, division, date, year and hour of the accident, daylight or dark, the name of his immediate supervisor, and particularly whether there was any loss of consciousness. The petitioner did not indicate loss of consciousness on the accident report, and he initialed that particular statement on the accident report. (TR 501-503, 505)

The petitioner was examined at the hospital and no mention was made of any pain or discomfort other than left shoulder and chest wall.

There was no treatment by the doctor at the hospital by way of sutures, stitches, bandages or anything on his head or face. (TR 504)

When he got to his supervisor's office, the petitioner and his supervisor completed the accident form and peti-

tioner initialed the items and signed the form. (TR 505-506)

It is significant to note at this point that the petitioner furnished to his supervisor the 5-digit car number of the railroad car that he claims was involved in the accident in question. The petitioner at that time was able to see the car's number as the car came toward him at the time of the alleged accident, even though he claims that the area was dark. The petitioner was also able to recall the number of the car after he had left the scene of the accident, and went to his supervisor's office and the hospital, even though he now claims to have been rendered unconscious and suffered a head injury at the time of the accident. The car number is not furnished to the skatemen prior to the railroad car's coming down the track.

On September 30, 1981, the petitioner was seen by Dr. Bernard Bacevich and treated for having post-traumatic scapular bursitis. Dr. Bacevich performed three CT scans and only one showed some possible bulging in the lumbar disc space; the others did not. A myelogram was performed which did not show bulging, and other X-rays of the back were made and were found to be normal. (TR 231, 233-234)

On cross-examination, Dr. Bacevich stated that he could find no reason for the petitioner's subjective complaints of pain, that the condition of traumatic bursitis can come from any type of accident, and sometimes can be seen in people without injury or are unable to tell the exact cause. At no time was any mention made by the petitioner to this doctor that at the time of his alleged accident, the petitioner was

rendered unconscious or had suffered a head injury. (TR 265-271, 276-278, 280)

Dr. Bacevich referred the petitioner to Dr. Phillip Edelstein, a psychiatrist in Cincinnati, Ohio, because petitioner was allegedly suffering from depression. Dr. Edelstein testified that at the time of his first examination on January 15, 1983, the petitioner showed a low-average range of intelligence and had psychiatric problems. Dr. Edelstein diagnosed the problem as post-traumatic syndrome with major depression and anxiety.

The petitioner filed a lawsuit in the United States District Court, Eastern District of Kentucky under 45 U.S.C. 51, *et seq.*, and Complaint was served on the respondent on May 23, 1984.

Dr. Edelstein last saw the petitioner on December 15, 1984, with a diagnosis of post-traumatic syndrome with major or psychotic depression. (TR 199) At no time during the treatment by Dr. Edelstein or hospitalizations of the petitioner, was there any mention of the petitioner's being rendered unconscious or having suffered a head injury in the alleged accident of August 4, 1981.

On December 17, 1984, the petitioner was examined at the request of the respondent by Dr. Kearns Thompson, a Board Certified Orthopedic Surgeon in Lexington, Kentucky. Dr. Thompson testified that there was no evidence of any residuals of injury to the lower back area and there was no evidence of any abnormal pressure on any of the nerves. (TR 568-569) The petitioner did not mention to Dr. Thompson that he had been rendered unconscious or that he had suffered a head injury in the alleged accident of August 4, 1981. (TR 568-569)

Dr. Thompson could find no indication of need for medical treatment, and the only functional impairment the petitioner had was as the result of the shoulder surgery, and that impairment would not affect his ability to work as a brakeman for the respondent. Dr. Thompson awarded him 2½ percent permanent impairment to the body as a whole. (TR 581-582)

On January 2, 1985, the petitioner was first seen at the request of the respondent, by Dr. Robert Phillip Granacher, Jr., a physician with specialties in psychiatry, forensic psychiatry, sleep medicine, and a medical professor of psychiatry at the University of Kentucky Medical School in Lexington, Kentucky. Dr. Granacher performed a mental status examination, laboratory testing, level functioning, electrolytes, as well as psychiatric testing. (TR. 395) On that examination, Dr. Granacher found the petitioner to have elements of psychomotor retardation; he was slow in his thoughts and movements. On the mental status examination, it was found that the petitioner had no clinically significant defects of memory, and had no clinically evident signs of language disorder. (TR 397)

The first mention of the petitioner's being rendered unconscious at the time of the alleged accident came about when the petitioner's attorney sent the petitioner to Dr. Ronald Kurt Ebert, a psychologist in Cambridge, Pennsylvania on January 14, 1985, over three years after the alleged accident. Dr. Ebert, as a psychologist, testified that based upon his testing, the petitioner "had dysfunction primarily in two regions of the brain; in the non-dominant hemisphere, the right, the back and the right side which caused his problems in visual perception, visual memory; it

also caused him some problems in language functioning, and also are the cause of his depression." (TR 330) In answer to a question by the petitioner's attorney, Dr. Ebert stated:

> Q. Did the history reveal parameters of loss of consciousness?
>
> A. Well, *it's very difficult to say if there was a loss of consciousness or not.* From what Mr. Howard stated from—there was no active recollection; he did not know how long he was lying on the ground after he fell off the railroad car before his co-worker came up to meet him. Under the circumstances of someone lying out in the middle of a switching yard in the dark, it's very, *very difficult for him to determine if he had been unconscious;* if he had, how long he had been unconscious. (emphasis added)

The petitioner was tested in the office of Dr. Irvin M. Gerson at the request of Dr. Ebert on January 15, 1985 and June 14, 1985. A brain stem evoked response test was performed which was found to be normal, and an electroencephalogram was run and was normal as to resting, and borderline as to the computer analysis that was performed by Dr. Gerson's employees. (TR 474-475) It was Dr. Gerson's opinion that the petitioner suffered from a brain dysfunction. (TR 378)

The petitioner was again seen by Dr. Robert P. Granacher on June 27, 1985, approximately one month prior to trial. At that time, Dr. Granacher performed a Luria Nebraska Neuropsychological Battery which showed evidence of brain dysfunction. (TR 401)

Dr. Granacher testified that there are many causes for this problem and stated

> Well, there are many causes. The kinds of causes that I normally see are brain tumors, multiple sclerosis, Alzheimer's disease, various conditions of the brain matter itself, debilitating conditions, brain infections, strokes, blood clots, head trauma, encephalitis, meningitis. Anything that can affect the brain tissue itself could produce abnormal results on this kind of examination.
>
> . . . .
>
> Blood vessel problems; blood vessels to the brain, carrying blood to the brain, thereby taking oxygen to the brain; the vascular system is the blood vessel system. (TR 402)

When Dr. Granacher was asked a hypothetical question which assumed facts basically as set forth in this Counter-statement of the Case as to whether or not a casual relationship existed between the condition he found in the petitioner on the two examinations and the accident that occurred in the Russell Yard on August 4, 1981, he stated that within the limits of reasonable medical probability, he could not draw the conclusion that the dysfunction shown on the Luria Nebraska was related to the accident. At the trial, Dr. Granacher testified as follows:

> Q. . . . what factor or factors [do] you rely upon in support of your position in your answer to that question here today.
>
> A. Well, there's a number of factors. The first factor is, this gentleman being able to recite all those digits after supposedly having a severe head injury, to be able to give back your Social Security number and give back a seven-digit employee number, remember the digits off the railroad car, do those kinds of things would be extremely unusual in someone. Anybody who has ever seen boxing matches knows when

a person is stunned or knocked down in the boxing match, for a significant period of time they cannot give relevant information back. That's one factor.

The second factor is, this man was examined within a few hours at the emergency room at a local hospital . . . and there is no evidence on those medical records of any head injury, any suspicion of head injury, any neurological dysfunction. Mr. Howard was in with the doctor by himself, had to give his own history to the doctor; no one else went in to the doctor to give it to him. So that's a factor.

The third factor, . . . Mr. Howard's lawyers had sent him to a psychiatrist in Virginia, by the name of Dr. Rosen. They had him examined February 12, 1982, six months after his accident. . . . Dr. Rosen also had psychological tests done. In Dr. Rosen's report there is no evidence of brain damage. Dr. Rosen said he thought Mr. Howard was suffering a stress disorder from the trauma of wrenching his arm, but nothing about brain damage, head injury, brain dysfunction. That's a factor.

Another factor is, this man was examined by Dr. Proctor, his personal doctor, who said nothing about brain damage. He was examined by Dr. Bacevich, orthopedic surgeon, who said nothing about brain damage; and he was sent to Dr. Edelstein approximately a year and a half after his accident and Dr. Edelstein admits him to the Bethesda Hospital, evaluates him and said the same thing Dr. Rosen did; that he had some type of stress disorder related to the trauma of having his arm wrenched and that he was depressed; again, no mention made of brain dysfunction or brain damage.

Taking all that together and adding it together leads me to the conclusion . . . this man has brain dysfunction in my judgment, in my judgment, something happened from the time of this accident in the railroad yard to the time I examined him in 1985.

Another factor is, Mr. Koenig's law firm sent this man to Philadelphia to be examined by Dr. Gerson. Dr. Gerson didn't do a personal examination of this man; he examined electrical records. He never laid eyes on the patient, never touched the patient, and never ordered C-T scan of his brain to see if he had a brain tumor, never had somebody check his spinal fluid, never did a confirmatory test necessary to show that what Dr. Gerson found was related to this accident, rather than some neurological condition that this man may well have that nobody has diagnosed because he has never been evaluated for it.

So those factors together lead me to the conclusion that you can't say that this accident that occurred on August 4, 1981 produced the dysfunction that I saw when I tested this man on June 27, 1985. (TR 407-409)

During the trial of July 17-23, 1985, Dr. William E. Cobb, an economist, testified on behalf of the petitioner that the petitioner's wage loss up to July 1, 1985, was $101,380 (TR 437), that he would have earned for 1981, $8,828; for 1982, $17,002; for 1983, $14,100; for 1984, $25,-360; and for 1985, $26,918. This was for loss of wages and did not include fringe benefits, but the figure of $101,380 was the wage loss and fringe benefits lost up until July 1, 1985.

Dr. Cobb testified as follows:

What does all that mean? Well, to make a rough estimate of economic damages, you could take the wages —say, in this case I estimated roughly $35,000 a year earning capacity; multiply it by the number of years you think that wages will be lost; you get a very rough approximation of what the lost earning capacity is.

So, despite all the rigamarole of trying to find what inflation is, how much you discount in terms of the

> *interest that will be earned, almost all of that washes out. So that . . . you can take the current wages, multiply it by the number of years and get a rough estimate.* (TR 431-437) (emphasis added)

Further, referring specifically to the petitioner's future lost wages, Dr. Cobb testified:

> And, again, a rough way to get that is to *take $35,000 a year for some forty years into the future, you would not be too far off with economic damages.* (TR 441) (emphasis added)

When cross examined concerning his statements on inflation, the economist testified that he was offsetting inflation and interest. What he admitted was ". . . inflation is on both sides of the teeter-totter . . . so I was offsetting inflation from inflation; inflation was the same". (TR 459-460)

After the trial of the case and before argument, the respondent renewed its motion to strike the testimony of the economist and further moved for a directed verdict in favor of the respondent. The court overruled all motions. (TR 596-598)

The trial judge then presented to the attorneys his proposed Charge to the jury (TR 599-613), and a discussion and objections followed. The attorney for the petitioner did not object to the instruction or the portion of the charge that concerns inflation, nor did he tender to the court an instruction concerning inflation. The attorney for the respondent tendered an instruction which asked the jury to award only present cash value of such future wage loss. The Court did not submit this instruction to the jury.

After closing argument of counsel, the Court charged the jury. (TR 644-656) Included in the charge, the court instructed the jury "you are not to single out any one instruction alon[e] as stating the law, but must consider the instructions as a whole". (TR 644)

As to expert witnesses, the court charged the jury

> You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely. (TR 647-648)

The court further instructed the jury

> On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of the injury, tangible and intangible; they are not an attempt to restore the Plaintiff—they are an attempt to restore the Plaintiff; that is, to make him whole or as he was immediately prior to his injuries. (TR 652)

and

> [Y]ou are instructed that you should not take into account any possible effect or present—or future inflation one way or the other. With regard to wages or earnings, the evidence and figures presented concerning those claims related to gross earnings; that is, earnings before income taxes and other deductions, not take-home pay. (TR 653)

Only after the arguments of counsel, and after the court charged the jury, did the attorney for the petitioner

first raise, in any manner, the issue of the court's charge as to inflation.

> MR. KOENIG: . . . Secondly, with respect to the instruction on inflation and taxes, the Court has said specifically, that the jury "In considering any element of damage to be experienced in the future, you are instructed that you should not take into account any possible effect of present or future inflation one way or another." I think that goes directly in the face of *Bock* [*sic*] *versus Penn Central,* and the *Jones-Laufler* [sic] case which has been cited.
>
> THE COURT: Why didn't you say that? . . . You were asked to consider the charge and you didn't mention that before.
>
> MR. KOENIG: I was not that—
>
> THE COURT: You didn't mention it before I charged the jury. (TR 657)
>
> . . . .

—————o—————

SUMMARY OF ARGUMENT

The charge to the jury, taken in its entirety, was based upon the testimony introduced in the trial of this case, and is not prejudicially erroneous. The issues raised by the petitioner were fully considered and correctly decided by the Court below.

—————o—————

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE PETITIONER CAN SHOW NO SPECIAL OR IMPORTANT REASON FOR GRANTING THE WRIT, AS REQUIRED BY SUPREME COURT RULE 17.1.

Supreme Court Rule 17.1 in part provides that review on writ of certiorari will be granted "only when there are special and important reasons therefor." There is no special or important reason to review on Writ of Certiorari because the total award by the jury of $100,000 was less than the accrued wage loss at the time of trial, and future economic damages were not awarded by the jury.

28 U.S.C. 2111 provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." *See also,* Rule 61, Federal Rules of Civil Procedure ("the court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties").

The doctrine of harmless error expressed above is applicable to claimed errors in jury instructions, *see, Kotteakos v. United States,* 328 U.S. 750 (1946); *Teal v. E. I. DuPont De Nemours and Co.,* 728 F.2d 799 (6th Cir. 1984); *Lewis v. Strickland Truck Lines,* 505 F.2d 164 (6th Cir. 1974), and such errors provide a basis for reversal of the trial court judgment only where there has been prejudice to the substantial rights of the complaining party.

Flanigan v. Burlington Northern, Inc., 632 F.2d 880 (8th Cir. 1980).

Moreover, the burden is on the petitioner to demonstrate prejudice to his substantial rights. *Westwood Chemical, Inc. v. Owens-Corning Fiberglass*, 445 F.2d 911 (6th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972).

It is well settled that in determining whether a claimed error in a jury instruction was harmless or prejudicial, the court must consider the instructions as a whole and must affirm the jury verdict if, taken as a whole, the charge fairly and accurately "presents the law *as it applies to the case at hand*". *Haislah v. Walton*, 676 F.2d 208, 212 (6th Cir. 1982) (emphasis added). *See also, Bach v. Ucho*, 697 F.2d 741 (6th Cir. 1983); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176 (6th Cir. 1983).

The trial court's instructions on damages specifically informed the jury that they should assess petitioner's damages in an amount found to be "full, just and reasonable compensation for all of the plaintiff's damages . . ." (TR 652), that damages could be awarded for "earnings or working time lost in the past *and any loss of ability to earn money in the future*" (TR 653) (emphasis added), and that compensatory damages are designed to *put the employee in as good a position as he would have been had the accident not occurred*:

> [C]ompensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury—tangible and intangible . . . *they are an attempt to restore the plaintiff, that is, to make him whole or as he was immediately prior to his injuries.* (TR 652) (emphasis added)

In *Rodgers v. Fisher Body Div., G.M.C.*, 739 F.2d 1102 (6th Cir. 1984), the court stated that "in the case of an injury of an economic nature, the injured party is to be placed, as nearly as possible, in the position he would have been in had the wrong not occurred." 739 F.2d at 1107.

The trial court's instructions adequately informed the jury of the general measure of damages for future lost wages. The petitioner objects to approximately four lines out of the approximately 11 pages of charge to the jury. Moreover, when the court's instructions are viewed against the backdrop of the relevant evidence introduced by the petitioner in the trial of this case, it is clear that petitioner was not prejudiced by the trial court's instruction concerning inflation.

Petitioner's economist, Dr. William Cobb, testified that the jury could make a rough approximation of petitioner's economic loss by simply multiplying petitioner's current annual wages ($35,000.00) by the number of years he could have been expected to work (forty years). (TR 441, 436-437) Both expressly and by inference, Dr. Cobb told the jury that they need not consider inflation, real wage increases or interest rates in assessing petitioner's economic loss:

> *So, despite all the rigamarole of trying to find what inflation is, how much you discount in terms of the interest that will be earned, almost all of that washes out. So that . . . you can take the current wages, multiply it by the number of years and get a rough estimate.* (TR 431-437) (emphasis added)

Further, referring specifically to the petitioner's future lost wages, Dr. Cobb testified:

> And, again, a rough way to get that is to take $35,000 a year for some forty years into the future, *you would not be too far off with economic damages.* (TR 441) (emphasis added)

Dr. Cobb offered the jury a factual and theoretical approach for calculating petitioner's future wage loss which did not include any consideration of inflation, interest or real wage increases; an approach that "would not be too far off with economic damages". *Again, the trial court's instructions told the jury that they could award damages for loss of ability to earn money in the future and that such compensatory damages are designed to make the employee whole; to make him as he was prior to his injuries.* Clearly, on the basis of Dr. Cobb's testimony and the court's instructions, taken as a whole, even without considering inflation, the jury could have awarded petitioner damages in an amount roughly approximating his claimed future wage loss.

An additional consideration relating to the effect of the inflation instruction, viewed in the context of the entire charge, is that the jury was not instructed that the award for future wage loss should be discounted to present value.

In this case, since the jury was not instructed to discount to present value, the trial court's instruction concerning inflation could not have had any tendency to undercompensate the petitioner. In *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2nd Cir. 1980), the court stated: "When a discount rate is adjusted to reflect inflation, it must be applied to a stream of earning *calculated without regard to inflation. . . .*" 634 F.2d at 40

(emphasis added). Obviously, where there has been no instruction to reduce to present value, it is entirely proper for the jury to calculate future earnings without regard to inflation. If anyone is harmed by such a procedure, it is the respondent. Manifestly, the error, if any, in the trial court's instruction concerning inflation was not prejudicial to the petitioner.

In making the determination of whether claimed error is harmless or prejudicial, the court is not restricted to an examination of the jury instructions alone. *Kotteakos v. United States, supra,* at 762 (emphasis added). *See also* 28 U.S.C. 2111 ("[T]he court shall give judgment *after an examination of the record* without regard to errors or defects which do not affect the substantial rights of the parties.") (emphasis added).

Further, the actual outcome of the proceeding is an important factor in assessing the effect of the error:

> To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. . . . And the question is . . . what effect the error had or reasonably may be taken to have had upon the jury's decision . . . *If when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand.* . . .

Id. at 764. (emphasis added). Although *Kotteakos v. United States* was a criminal case, the "harmless error" statute which the Court discussed was applicable to civil cases as well. *Id.* at 762.

Here, petitioner claimed to have sustained injury to his shoulder and back, as well as a brain dysfunction, as a

result of the alleged accident of August 4, 1981. Based on the evidence in the record, the jury could properly find that petitioner was *not* permanently disabled as a result of respondent's negligence, and therefore, that damages for future lost wages need not be assessed. That the jury did so find is evident from the fact that they awarded petitioner $100,000, even though petitioner's economist testified that petitioner's past wage loss at the time of trial was $101,380. (TR 437)

It is well settled, as a general principle of law, that errors in jury instructions as to particular elements of damage are harmless where the jury does not allow recovery for that item of damage. 5A C.J.S. *Appeal and Error,* 1773(2); 75 Am.Jur.2d, *Trial,* 923.

Based on the total award for damages of $100,000 in this case, it is clear that the jury never considered the issue of damages for future wage loss, having found that petitioner was not permanently disabled *as a result* of the alleged accident of August 4, 1981. Accordingly, the trial court's instruction concerning inflation "did not influence the jury, or had but very slight effect . . .". *Kotteakos v. United States, supra* at 764. The error, if any, was harmless.

The issues raised by the petitioner in his Petition were fully considered by the Court below, and the respondent believes the Court below correctly decided these issues.

In his Petition, the petitioner raised the issue of the respondent's closing argument. On this issue, the Court below stated:

> The defendant railroad did not call any economist to the stand, and in final argument to the jury the railroad's counsel spent most of his time attempting to minimize the extent of the plaintiff's physical and mental problems and arguing that they were not the result of the alleged accident. Defense counsel devoted only three transcript pages of argument to the question of economic damages. Pointing out that plaintiff's actual wages in his last full year of employment had been about $16,000, counsel argued that if the jury awarded $160,000, and the plaintiff invested that amount at 10% per annum and never invaded the principal, plaintiff could receive a lifetime income of $16,000 per year and still leave $160,000 to his wife and children at his death. *Plaintiff's counsel did not object to this argument.* (App. 7) (Emphasis added)

As to the issue of future earnings, the Court stated:

> The jury was not obliged to find the defendant railroad responsible for any disability that may have existed at the time of trial, of course, and if the jury intended to award nothing for loss of future earnings, it is immaterial whether instructional error might have led the jury to think the maximum allowance for loss of future earning capacity was "roughly" $1.5 million rather than $1.7 million. (App. 9)

Concerning the role of inflation in projected earnings, the decision of the Court below also stated:

> . . . because plaintiff's own evidence indicated that inflation in projected earnings is "washed out" by the inflation component of the interest rate used in present value calculations, and inflation therefore makes no difference in the determination of the value of future earnings. (We note also that although the "total wash-out" or "total offset" concept has not been accepted as a mandatory federal rule of decision, it is prominently featured on the menu of economic

> theories from which courts may currently choose in FELA cases. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 *supra.* The "total offset" method of calculating the present value of future earnings depends on the validity of the method's implicit assumptions as to the relationship between the future course of wage rates and the future course of interest rates, and the time may come when those assumptions will be thought so wide of the mark that the method will have to be abandoned. *In the case at bar, however, there is affirmative—and uncontradicted—evidence that the assumptions are currently tenable.*) (App. 13) (Emphasis added)

The Court below reached the conclusion that the jury charge in its entirety fairly represented the law as it applied to the case at hand, and stated:

> Taking as a whole the charge given in this case, and considering it in relation to the evidence that was before the jury, we think the judgment entered on the jury's verdict ought to be affirmed. The charge as given would have permitted the jury to award roughly $1.5 million for future lost earnings, if the jury had taken all of plaintiff's evidence at face value, and we are not persuaded that the charge, read in light of the testimony, entitles plaintiff to another shot at a higher verdict. (App. 13-14)

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CONCLUSION

For the reasons stated above, the respondent, The Chesapeake and Ohio Railway Company, respectfully submits that there are no special or important reasons for

granting a Writ of Certiorari in this case, and respectfully urges this Court to deny the present Petition.

Respectfully submitted,

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APPENDIX

Burns Scott HOWARD,

Plaintiff-Appellant,

v.

The CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant-Appellee.

No. 85-6106.

United States Court of Appeals,
Sixth Circuit

Argued Oct. 16, 1986.

Decided Feb. 17, 1987.

Frank H. Warnock, Warnock and Warnock, Greenup, Ky., Ralph E. Koenig (argued), Minneapolis, Minn., Michael L. Weiner, for plaintiff-appellant.

Paul Hobbs (argued), Ashland, Ky., for defendant-appellee.

Before NELSON and RYAN, Circuit Judges, and ENSLEN, District Judge.

DAVID A. NELSON, Circuit Judge.

Dissatisfied with a $100,000 jury verdict he recovered in a Federal Employers' Liability Act action against the defendant railroad, plaintiff Burns Scott Howard has appealed the judgment entered on that verdict. Although the trial court declined to give a jury instruction requested by the defendant railroad to the effect that future earnings ought to be discounted to their present value, should the jury decide to award damages for loss of future earning capacity, plaintiff contends that the trial court nonetheless erred in instructing the jury to disregard the effect of inflation in considering any such award. Finding, on the particular record before us, no prejudicial error, we shall affirm the judgment.

I

Plaintiff Howard, who was 26 years old at the time of trial in mid-1985, was graduated from high school in 1977. He went to work for the railroad in the summer of 1978, and worked there full-time (except for periodic furloughs occasioned by economic conditions) until August 4, 1981, when he was allegedly injured in an accident. He did not work thereafter.

Plaintiff's evidence showed that on the night in question he was working as a "skateman" in a rail yard, where his job was to climb aboard moving coal cars and bring them to stop by setting their handbrakes; that the cars were being sent down the classification tracks at an excessive rate of speed, the yard was not adequately il-

luminated, and the work area had debris in it; and that plaintiff lost his footing as he tried to climb aboard one of the cars, tripped over a piece of debris, and fell to the ground, injuring his left shoulder, arm and rib cage. Plaintiff was taken to the office of a trainmaster, who, after making a visual inspection for injuries, drove him to a nearby hospital. The hospital charts and accident reports filled out at the time indicated no loss of consciousness and no head injury; plaintiff seemed mentally alert, and the pupils of his eyes were not dilated. He subsequently contended, however, that the accident—which was not witnessed by anyone else—must have knocked him unconscious.

Plaintiff went home after having been seen in the hospital emergency room, but he was hospitalized two days later for back and shoulder pain. An othopedic surgeon operated on his shoulder in May of 1982. By the summer of that year plaintiff was showing signs of mental depression. In January of 1983 a psychiatrist saw him and made a diagnosis of post-traumatic syndrome, with major depression and anxiety. In 1985 a neuropsychologist made a diagnosis of brain dysfunction; that diagnosis was subsequently confirmed by other experts, including a psychiatrist who examined plaintiff for the defendant railroad.

The evidence was in dispute as to whether the brain dysfunction diagnosed in 1985 could be said, with reasonable medical certainty, to have been caused by the accident plaintiff claimed to have suffered in 1981. Plaintiff's expert witnesses opined that there was a direct causal relationship, and the defendant railroad's expert denied that any such causal relationship had been established. The defendant's expert testified that although plain-

tiff's condition might possibly have been caused by a fall that knocked him out, the condition could also have been the result of intercerebral multiple sclerosis, Alzheimer's disease, a brain tumor, a blood clot, meningitis, infection, deoxygenation of the brain during general anesthesia, or various other causes that had not been ruled out. Plaintiff's lawyers argued to the jury that the brain damage was "the real thing in this case . . . the most devastating injury of all," and a major question before the jury was whether plaintiff had in fact shown that he suffered from brain damage caused by his alleged fall at work.

The defense presented testimony from a union official, one Frank Davis, to the effect that plaintiff had complained, several weeks before the alleged accident, of having hurt his left shoulder while doing farm work. Mr. Davis testified that there had been discussion of the possibility of plaintiff's receiving disability payments from the railroad on account of his shoulder condition, and that he (Davis) had made an anonymous telephone call to a railroad claim agent to suggest that plaintiff's claim was fraudulent. Mr. Davis' testimony was vigorously challenged on cross-examination, and other employees who were supposed to have heard the original conversation denied that it had taken place.

With respect to plaintiff's earnings prior to the accident, plaintiff did not disagree with records showing that his railroad wages (exclusive of the value of fringe benefits) had been $5,122 in 1978, $8,587 in 1979, $16,237 in 1980, and $9,969 in 1981. Through an economist, Dr. William Cobb, plaintiff presented evidence that the fringe benefits and wages lost thereafter up to the beginning of the month in which the trial was held, July of 1985, had

come to slightly over $100,000. The railroad made no significant attempt to suggest that this $100,000 actual earnings loss figure was not accurate.

Dr. Cobb also testified on what plaintiff's future earning capacity would have been had he not been permanently disabled at the time of trial. Dr. Cobb explained that he had attempted to estimate the future "real" wage increases that the plaintiff would have received over the course of a normal working career with the railroad, expressing those increases in constant 1985 dollars without any element of inflation. Dr. Cobb said he also attempted to determine the present value of that stream of future earnings, discounting the earnings at an unspecified "real" interest rate that might have obtained in an environment free of inflation and of any expectation of inflation. With adjustments for anticipated taxes on both the wages plaintiff could have been expected to earn if he had remained at work and the income he could be expected to receive on a lump sum damage award, and with further adjustments for what Dr. Cobb believed to be reasonable (but unspecified) assumptions as to life expectancy, furlough rates, risk of illness or job loss because of economic conditions, and so forth, Dr. Cobb testified that in his opinion the present value of the loss of future wages and fringe benefits experienced by a permanently disabled 26 year old railroad worker with the plaintiff's earnings history and seniority would be slightly over $1.7 million.

Asked on cross-examination if there was a prediction of future price inflation in any portion of his calculations, Dr. Cobb testified that there was only one place in his economic model where it had been necessary to use an estimate for inflation: that was in projecting the taxes on the in-

come from a hypothetical lump sum damage award. The inflation rate used in this connection, Dr. Cobb testified, was 7.24% per annum, carried out through the year 2028.

Dr. Cobb did not say what figure his economic model would have yielded had he assumed an inflation rate of zero, but he did testify that a rough approximation of the value of plaintiff's earning capacity could be arrived at by taking $35,000 a year (plaintiff's estimated wages plus fringe benefits for the first half of 1985 having come to about half that amount) and simply multiplying $35,000 by the remaining number of years plaintiff might have worked. Assuming, as Dr. Cobb invited the jury to do, that plaintiff would have worked 43 more years, this computation (43 X $35,000=$1,505,000) would peg the future earning loss at roughly $200,000 below the figure produced by the more sophisticated economic model. The jury could thus have inferred that if Dr. Cobb has assumed no inflation when he made his sophisticated present value calculation, he would have come up with an estimated earning loss of roughly $1.5 million as opposed to $1.7 million.

The reason inflation did not play a bigger part in Dr. Cobb's calculations, as he explained, was that in his view the market rate of interest appropriately used in making a present value calculation approximates the percentage rate at which wages can be expected to rise in the future. Inflation rates have historically been a major component of interest rates, Dr. Cobb said, and whatever assumptions are made about the course of future inflation, inflation should not be a significant factor in the calculation of economic loss: the inflation element in the present value calculation offsets the inflation element in the calculation of future earnings. "[D]espite all the rigamarole of trying to

find what inflation is," he testified, "how much you discount it in terms of the interest that will be earned, almost all of that washes out." When asked, on cross-examination, if he claimed to be able to predict what the inflation rate will be 10, 15 or 20 years from now, Dr. Cobb answered "No. I'm saying, in fact, it doesn't make any difference. . . ."

The defendant railroad did not call any economist to the stand, and in final argument to the jury the railroad's counsel spent most of his time attempting to minimize the extent of the plaintiff's physical and mental problems and arguing that they were not the result of the alleged accident. Defense counsel devoted only three transcript pages of argument to the question of economic damages. Pointing out that plaintiff's actual wages in his last full year of employment had been about $16,000, counsel argued that if the jury awarded $160,000, and if plaintiff invested that amount at 10% per annum and never invaded the principal, plaintiff could receive a lifetime income of $16,000 per year and still leave $160,000 to his wife and children at his death. Plaintiff's counsel did not object to this argument.

The jury was charged by the trial court that if plaintiff were found to have been injured as a consequence of the defendant railroad's negligence, the jury should assess as damages no more and no less than the amount found, by a preponderance of the evidence, to be full, just and reasonable compensation for all of the loss so caused. Among the elements of damage the jury was told it should consider, to the extent it found them proved by a preponderance of the evidence, were "any earnings or working time lost in the past and any loss of ability to earn money in the

future. . . ." In considering any element of future damage, the trial court continued, "you are instructed that you should not take into account any possible effect [of] present . . . or future inflation one way or the other." The jury was also told that any award would not be subject to income taxes, "and you should not consider any such taxes in fixing the amount of your award. . . ."

Significantly, the jury charge did not include an instruction, requested by the defendant railroad, on reducing future earnings to present value—this despite the fact that in a colloquy outside the presence of the jury, the trial judge and counsel for both of the parties had all agreed that there must be a reduction of future earnings to present value. Counsel for the railroad did not specifically renew his request for a present value instruction after the charge had been given, but plaintiff's counsel specifically objected to the instruction that the jury "should not take into account any possible effect of present or future inflation one way or another." The court declined to change its instructions.

The jury returned a verdict for the plaintiff and against the defendant railroad, assessing the plaintiff's actual damages in the amount of $100,000. There were no special interrogatories, and the jury was not asked to state whether it found the accident had caused any disability likely to extend beyond the time of trial. The plaintiff moved for a new trial on damages, contending that the jury should not have been instructed to disregard inflation in determining future damages. The motion for a new trial was denied without opinion, and this appeal followed.

II

A claimed earnings loss of over $100,000 having already accrued by the time of trial, it may seem inherently improbable that the jury's award of damages totaling $100,000 was intended to include anything at all for loss of future earning power. The jury was not obliged to find the defendant railroad responsible for any disability that may have existed at the time of trial, of course, and if the jury intended to award nothing for loss of future earnings, it is immaterial whether instructional error might have led the jury to think the maximum allowance for loss of future earning capacity was "roughly" $1.5 million rather than $1.7 million.

Regardless of whether there were technical errors in the court's charge on the evaluation of future earning capacity, moreover, the trial judge may well have been correct in suggesting, as he did in overruling a motion by the railroad to strike the economist's testimony in its entirety, that "if the Plaintiff wishes to spread their blanket clear across the courtroom" with an obviously overblown estimate of damages, "that will be to [the defendant's] advantage ultimately." The jury may or may not have been better equipped than Dr. Cobb was to guess the course of future inflation, and the jury probably had no idea of how to go about making present value calculations itself, but it would not be surprising if the judge was reading his jury accurately when he intimated that the jury would think it absurd to award this plaintiff $1.5 million or more in respect to future earnings. The jury could have reasoned that if invested in long term tax exempt municipal bonds paying 7% per annum, for example, a $1.5 million lump sum award could be expected to yield more than

$100,000 per year and quite possibly leave plaintiff, at his death, still a millionaire (in dollars of the day), if he managed to avoid invading his capital for living expenses. In the Eastern District of Kentucky, at least, it will probably take a good many years of high inflation before most people will feel railroad hands cannot make do on less than $100,000 a year.

Still, the thought processes of juries in Eastern Kentucky are no more susceptible to divination by outside agencies than are those of juries elsewhere, and we need not rest our decision on the proposition that any instructional error committed by the trial court in this case was harmless. Given the nature of the expert testimony presented here, and in view of the court's failure to give a present value charge, we think it would have been potentially more confusing for the jury to be told it could take inflation into account than to be told otherwise.

Conceptually, to be sure, it would have been perfectly appropriate for the plaintiff's expert witness to have factored inflation (or deflation) into his future earnings estimate, if there had been some rational basis for predicting what the future inflation or deflation would amount to and when it would occur, and if the witness discounted the projected future earnings by an interest rate reflecting comparable assumptions as to the future course of the dollar. This is not what Dr. Cobb claimed to have done, of course: he admitted that he could not predict what the rate of inflation would be in the future, he said he did not take inflation into account in projecting plaintiff's future earning, and he said he did not discount those earnings to present value with the kind of interest rate likely to obtain in

a world where investors assume there is at least some risk of inflation.

If plaintiff had proffered testimony to the effect that inflation could be expected to push his earnings up for 40 years or more at a compound annual rate of more than 7% (that being the inflation rate assumed by Dr. Cobb for one relatively minor part of his economic model), such testimony might have been subject to objection—at least if plaintiff's expert witness did not use a correspondingly high discount rate in reducing estimated future earnings to their present value. See *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir.1970), *cert. denied*, 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153 (1971) and *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6th Cir.1974). where this court indicated that testimony projecting significant wage increases far into the future is so speculative as to be inadmissible. Even if such testimony is inadmissible, however, it is well established that the jury may normally consider the possibility of future increases or decreases in the purchasing power of money. Thus in *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117, *supra*, we held that "[e]ven though no expert testimony on inflation and future increases was admitted, it was still error for the district court to charge the jury that it should not consider 'future increases or decreases in the purchasing power of money.'" *Id.* at 1122. *Cf. Morvant v. Construction Aggregates Corp.*, 570 F.2d 626 (6th Cir.), *cert. dismissed*, 439 U.S. 801, 99 S.Ct. 44, 58 L.Ed.2d 94 (1978), where we held it was reversible error to exclude expert testimony on the prospect of future wage increases.

It is equally clear, on the other hand, that the plaintiff in an FELA case is not entitled to recover more, in respect

of lost future income, than the present value of such income, and the jury ought to be so advised. *St. Louis Southwestern Railway Co. v. Dickerson,* 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). To let the jury take the prospect of future inflationary wage increases into account without clear guidance on the need for reducing future earnings to their present value would be grossly unfair to the defendant.

That unfairness would be particularly striking in the case at bar, where the only inflation rate ever mentioned was 7.42%, and where the jury, unless cautioned otherwise, could have inferred it was free to project that rate into the future for a period of 40 years or more. Without a proper present value instruction, this could have led to utterly ludicrous results—particularly in view of Dr. Cobb's testimony that a rough approximation of the earning loss could be arrived at by aggregating undiscounted annual earnings. In describing that rough approximation technique, which corresponds to the "total offset" approach discussed in *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), Dr. Cobb did not intend to suggest, of course, that it would be appropriate to aggregate annual earnings after they had been adjusted upward for inflation. On the record of this case, however, Dr. Cobb having testified repeatedly that inflation made no significant difference, the jury might well have been confused by an instruction inviting it to take inflation into account.

Because of Dr. Cobb's testimony, we think it unnecessary to remand the case for a new trial in which the jury would be told both that it could take into account the possibility of future inflation and that projected future earn-

ings must be discounted to their present value. Advice from the trial court as to these two countervailing considerations would have added little or nothing to the jury's deliberations, because plaintiff's own evidence indicated that inflation in projected earnings is "washed out" by the inflation component of the interest rate used in present value calculations, and inflation therefore makes no difference in the determination of the value of future earnings. (We note also that although the "total wash-out" or "total offset" concept has not been accepted as a mandatory federal rule of decision, it is prominently featured on the menu of economic theories from which courts may currently choose in FELA cases. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768, *supra.* The "total offset" method of calculating the present value of future earnings depends on the validity of the method's implicit assumptions as to the relationship between the future course of wage rates and the future course of interest rates, and the time may come when those assumptions will be thought so wide of the mark that the method will have to be abandoned. In the case at bar, however, there is affirmative—and uncontradicted—evidence that the assumptions are currently tenable).

A federal appellate court reviewing a challenge to jury instructions is "required to judge the charge as a whole and to affirm the jury verdict if, taken as a whole [the trial court's charge] fairly presents the law as it applies to the case at hand." *Haislah v. Walton,* 676 F.2d 208, 212 (6th Cir.1982). Taking as a whole the charge given in this case, and considering it in relation to the evidence that was before the jury, we think the judgment entered on the jury's verdict ought to be affirmed. The charge

as given would have permitted the jury to award roughly $1.5 million for future lost earnings, if the jury had taken all of plaintiff's evidence at face value, and we are not persuaded that the charge, read in the light of the testimony, entitles plaintiff to another shot at a higher verdict.

AFFIRMED.

No. 86-1846

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

BURNS SCOTT HOWARD,

Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

A. Respondent's Claim that the Jury Awarded No Future Damages is Sheer and Utter Speculation 2

B. Petitioner's Economist Considered Inflation To Be a Critical Part of His Calculations 4

C. The Lack of a Present Value Instruction Does Not Vitiate the Trial Court's Erroneous Instruction on Inflation 6

D. Petitioner Timely Objected to the Trial Court's Erroneous Charge on Inflation 6

Conclusion 7

TABLE OF AUTHORITIES

CASES: Page

Bach v. Penn Central Transportation Co., 502 F.2d 1117 (6th Cir. 1974) 2, 7

Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983) 1, 6, 7

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PETITIONER'S REPLY BRIEF

In its responsive brief, the respondent Chesapeake and Ohio Railway Company all but concedes the error of the trial court's instruction that the jury could not consider inflation in calculating petitioner/plaintiff's future damages. Faced with the unequivocal mandate of this Court in *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983), as well as the United States Court of Appeals for

the Sixth Circuit in *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6th Cir. 1974), that inflation *is* to be considered in calculating future damages, the respondent railroad avoids focusing on the plain error committed by the trial court, and instead searches out every excuse imaginable as to why petitioner was not prejudiced by this erroneous instruction. Seeking to avoid a new trial at which the jury would be *properly* instructed, the railroad erroneously claims (a) that future economic damages were not awarded by the jury; (b) that Dr. Cobb told the jury that they need not consider inflation in calculating future damages; and (c) that the erroneous instruction on inflation was offset by the lack of a present value instruction. Respondent also deliberately leaves the false impression that the issue of inflation was not timely raised before the district court. The following will show that the railroad's attempts to excuse away the trial court's erroneous charge cannot hide the fact that the district court's error is *so fundamental*, and *so crucial* to a fair calculation of future damages in any case, that review should be granted and a new trial awarded.

A. Respondent's Claim that the Jury Awarded No Future Damages is Sheer and Utter Speculation

Respondent seeks to avoid the fundamental error of the trial court's instruction by asking this Court to accept at face value its bald assertion that "future economic damages were not awarded by the jury." (Respondent's Brief p. i) The simple question thus raised is, of course, how does the railroad know that the jury awarded no future damages? Where in the record is there *any* support for this claim? The railroad cannot cite to the record to sup-

port this assertion because it is in fact the product of the railroad's surmise, speculation and wishful thinking. The jury verdict form did not require the jury to break down petitioner's damages into different elements, but instead required the jury to return a *single sum* for all elements of both past and future damages. Under the particular circumstances of petitioner's injuries, where he not only suffered musculoskeletal injuries to his lumbar spine and scapula, but brain dysfunction that was not accurately diagnosed until several years later (including an initial inaccurate diagnosis by the *railroad's* examining doctor, Dr. Granacher, TR 418), the jury could have found that petitioner was totally and *permanently* disabled by either his orthopedic injury or his brain injury, or both. What was missing from the record, however, was *any* evidence from *any* witness that petitioner's disability *ended on the day of trial.* Yet, this is the conclusion respondent would urge here, by claiming that the railroad awarded petitioner his past damages to the time of trial, but not a penny thereafter.

What portion of the jury's verdict was actually intended to compensate him for his future damages? By virtue of the railroad's closing argument, the jury could very well have concluded that the same sum awarded to petitioner for his past wage loss (approximately $101,000.00) would also compensate him for his future damages because of the interest he would earn upon this sum. Urging the jury to use an interest rate of "10 percent," the railroad's counsel told the jury to figure out how much money they wanted to give petitioner a year, and using the amount petitioner had earned his last year of employment (approximately $16,000.00) and the 10 percent market interest rate:

> He would get that money every year for the rest of his life; then when he died, he would still have $160,000.00 to leave to his wife and children. This is what reduction of present worth means. (Respondent's closing argument TR 636-37)

If the jury accepted this part of the railroad's reasoning, it could well have found that petitioner's net future damages averaged over his lifetime wouldn't have exceeded $10,000.00 annually (by virtue of taxes, layoffs, or a whole multitude of other reasons) and thus considered its award of $100,000.00 to be adequate compensation for both past and future damages.

Does this explanation of the jury's verdict require speculation? Of course it does; just as does the railroad's claim that the jury awarded no future damages. In reality, it is impossible for anyone but the jurors themselves to divine what they intended by their verdict. What one can be certain about, though, based on the evidence at trial, is that the jury awarded *some* future damage, and that its *entire award of future damages* was tainted by this erroneous instruction, and petitioner's award correspondingly improperly lessened.

B. Petitioner's Economist Considered Inflation To Be a Critical Part of His Calculations

Contrary to the railroad's repeated misleading characterization of Dr. Cobb's testimony, Dr. Cobb *never* either "expressly and by inference . . . told the jury that they need not consider inflation . . . in assessing petitioner's economic loss." (Respondent's Brief p. 16) Dr. Cobb did indeed testify that inflation "washes out" in his calculations (TR 437) but what the railroad forgets to

add is that Dr. Cobb told the jury that inflation washes out of *both sides* of his calculation, both the earnings side and the interest rate side that is used to discount his earnings to present value. The railroad, on the other hand, washed out inflation only in *one* side of its calculations, the earnings side, and instead used the *market interest rate* of 10 percent when it instructed the jury in its closing argument to reduce petitioner's future damages to present value (TR 636-37). The market rate of interest, of course, is made up mostly of an inflationary component, which is why Dr. Cobb used the real rate of return in his calculations (inflation being "washed out"). Yet, the railroad ignores this crucial distinction, and incorrectly claims Dr. Cobb's calculations didn't consider inflation.

Indeed, it was obvious to the jury from Dr. Cobb's extensive testimony (TR 428-462) that inflation in fact played a *critical role* in his calculations. Dr. Cobb explicitly stated his reliance on inflation in calculating both earnings and the real rate of return (as quoted at length in Petitioner's Brief, p. 7-8). Even his testimony that petitioner's total economic loss could be roughly calculated by multiplying his annual wages (approximately $35,000.00) times his work life expectancy (approximately 43 years) was *premised* upon these critical effects of inflation. Yet, by virtue of the trial court's grievous error, the jury was left with the erroneous impression that Dr. Cobb's numbers were vastly inflated and inaccurate, the net result which was to destroy his credibility and adversely effect the jury's calculation of damages.

C. The Lack of a Present Value Instruction Does Not Vitiate the Trial Court's Erroneous Instruction on Inflation

It is particularly interesting that the railroad now relies so heavily on the district court's failure to give the instruction *it requested* on reduction to present worth, an omission by the trial court to which it *never even objected*. In reality, the railroad had the benefit of this principle, not only by virtue of the common sense and understanding of jurors that money in the hand today is worth more than money to be paid tomorrow; but also by virtue of its closing argument wherein it urged the jury to discount petitioner's future damages by the market rate of 10 percent (an argument that was not contradicted by any instruction).

It must be emphasized that this is *not* a case where counsel for the parties specifically agreed that inflation would precisely offset a reduction to present value, and where neither side argued the point to the jury. Instead, this was a circumstance where one side had the advantage and the other side didn't. The fact that this court in *Jones & Laughlin* recognized that inflation is offset to present value points out the necessity of one balancing the other. Here, there was no inflationary balance to the railroad's present worth argument, the result which worked to the severe prejudice of petitioner.

D. Petitioner Timely Objected to the Trial Court's Erroneous Charge on Inflation

While never directly arguing the point, the railroad purposely seeks to imply in its brief that Petitioner did not properly or timely raise the erroneous inflation instruction before the district court. (Respondent's Brief

p. 12-13) To the contrary, both the district court and the court of appeals recognized that the objection was timely made. (App. 8) The objection was made after the charge, instead of before, because the trial court did not provide counsel with its proposed charge until immediately after the conclusion of testimony and between the parties motions for directed verdicts, and right before closing arguments. (TR 559-600) Petitioner's counsel did not have the opportunity to closely review the charge and object until after it was given (but before the submission of the case to the jury). He then made his objection at the time designated by the trial court and even cited the *Jones & Laughlin* and *Bach v. Penn Central* cases relied upon here. (TR 656-57) Petitioner's objection to this erroneous instruction on inflation was both proper and timely, preserving this issue for review here.

CONCLUSION

The Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit should be granted.

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